

Message Text

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47

ACTION L-02

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FM AMEMBASSY QUITO

TO SECSTATE WASHDC 4560

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E.O. 11652: N/A

TAGS: EINV EC

SUBJECT: CALVO CLAUSE AND RELATED PROVISIONS

REF: STATE 024007

1. ACCORDING TO THE 1945 CONSTITUTION IN FORCE UNDER THE PRESENT GOVERNMENT (EXCEPT AS IT CONFLICTS WITH GOVERNMENT DECREE), ARTICLE 146 READS AS FOLLOWS IN INFORMAL TRANSLATION: BEGIN QUOTE FOREIGN COMPANIES OR INDIVIDUALS WHO ARE CONCESSIONAIRES OF NATIONAL RESOURCES SHOULD BECOME ESTABLISHED IN THE COUNTRY AND MAY NOT, UNDER ANY CIRCUMSTANCES, CLAIM AN EXCEPTIONAL POSITION OR HAVE RECOURSE TO DIPLOMATIC CLAIMS. END QUOTE. IN THE OPINION OF A LOCAL EXPERT ON COMMERCIAL LAW, THE CALVO CLAUSE IS IMPLICIT IN ALL INVESTMENT CONTRACTS WITH FOREIGN COMPANIES.

2. THE ANDEAN INVESTMENT CODE (DECISION 24) WAS ADOPTED IN 1971 BY THE GOVERNMENT OF ECUADOR. ARTICLE 50 STATES THAT MEMBER COUNTRIES OF THE PACT SHALL NOT GRANT TO FOREIGN INVESTORS ANY TREATMENT MORE FAVORABLE THAN THAT GRANTED TO NATIONAL INVESTORS. ARTICLE 51 CONTINUES THAT BEGIN QUOTE IN NO INSTRUMENT RELATING TO INVESTMENTS OR THE TRANSFER OF TECHNOLOGY SHALL THERE BE CLAUSES THAT REMOVE POSSIBLE CONFLICTS OR CONTROVERSIES FROM THE NATIONAL JURISDICTION AND COMPETENCE OF THE RECIPIENT

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COUNTRY OR ALLOW THE SUBROGATION BY STATES TO THE RIGHTS AND

ACTIONS OF THEIR NATIONAL INVESTORS. END QUOTE. THERE IS, HOWEVER, A METHOD FOR ARBITRATION IN CASE OF DISPUTES AMONG MEMBER COUNTRIES OF THE ANDEAN PACT. THAT IS, THE CONFLICT WILL BE REFERRED TO THE ANDEAN PACT COMMISSION IN ACCORDANCE WITH PROCEDURE OUTLINED IN THE ORIGINAL CARTAGENA AGREEMENT.

3. COMMENT: ALTHOUGH THE CALVO CLAUSE IS LEGALLY IN FORCE IN ECUADOR IN BOTH THE CONSTITUTION AND DECISION 24, IT IS NOT INVOKED AS A PRACTICAL MATTER WHEN THE HOME GOVERNMENT SEEKS INFORMALLY TO ASSIST IN THE RESOLUTION OF DISPUTES INVOLVING FOREIGN INVESTMENTS. NEVERTHELESS, REQUESTING HOME GOVERNMENT ASSISTANCE MAY BE A HIGHLY CHARGED POLITICAL ISSUE DEPENDING ON THE CASE. THE ANDEAN PACT INVESTMENT AGREEMENT HAS BEEN RATHER LIBERALLY INTERPRETED BY THE GOE SINCE RATIFICATION BUT RECENT DEVELOPMENTS INDICATED THAT THE GOE IS BEGINNING TO TIGHTEN CERTAIN PROVISIONS OF DECISION 24.
BREWSTER

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